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JUN 11 2003

BANKRUPTCY COURT
OAKLAND, CALIFORNIA

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re

No. 01-41571 J11
Chapter 11

SOFTWARE LOGISTICS CORPORATION,
a California corporation, dba
iLogistix; LOGISTIX SCM U.S.,
INC., a Delaware corporation;
LOGISTIX SCM NETHERLANDS, INC.,
a Delaware corporation; LOGISTIX
C.V., a Netherlands limited
liability company;

Jointly Administered
with Cases Nos.
01-41573 J11
01-41574 J11
01-41575 J11
01-41576 J11

Debtors./

MEMORANDUM DECISION - MOTION FOR RECONSIDERATION

On June 6, 2003, this court entered its Order Denying Motion for Reconsideration by which it denied a motion by Stephen G. Weinstein and Marta E. Weinstein, individually and as trustees of a certain living trust (the "Weinstein Parties"), seeking reconsideration of this court's order entered March 13, 2003. By the order of March 13, 2003, the court denied a motion by Bradley D. Sharp, chapter 11 trustee (the "trustee"), seeking authority to:

(a) forgive certain debts owed to the estate by the Weinstein

1 Parties and (b) convey to them certain software technology owned by
2 the estate. This Memorandum Decision sets forth the court's reasons
3 for doing so.

4 The trustee packaged the original motion as one seeking
5 authority under Bankruptcy Code § 363(b)¹ to "use" valuable estate
6 property out of the ordinary course of business by giving it to the
7 Weinstein Parties. The present motion by the Weinstein Parties
8 repackages the trustee's motion as one seeking nunc pro tunc
9 authority for the trustee to employ the Weinstein Parties as
10 professional persons in accordance with what appears to have been a
11 secret side deal between the trustee and the Weinstein Parties, or
12 to compensate them on a quantum meruit basis beyond the scope of
13 their employment contract with the trustee.

14 Notwithstanding the new wrapper and bows that the Weinstein
15 Parties have placed around the trustee's motion, what is being asked
16 is, again, nothing other than the court's permission for the trustee
17 to make a substantial gift of estate property to the Weinstein
18 Parties.² Again, the court declines to grant such permission.

20
21 ¹Bankruptcy Code § 363(b) provides "The trustee, after
22 notice and a hearing, may use, sell, or lease, other than in the
ordinary course of business, property of the estate."

23 ²The court notes that the present motion (no pun intended)
24 was filed by the chapter 11 trustee whereas reconsideration is
25 being requested, not by the trustee, but by the Weinstein
26 Parties. The court will assume, without deciding, that the
Weinstein Parties have standing to request reconsideration of the
trustee's motion.

1 A. Background

2 The above debtors filed their voluntary chapter 11 petitions
3 herein on March 23, 2001. At the date of the petitions, Marta
4 Weinstein was the Chief Executive Officer of debtor Software
5 Logistics Corp. and Stephen Weinstein had an executive role. On
6 October 12, 2001, the court appointed the trustee.

7 Following his employment, the trustee sought and obtained
8 authority of this court to provide an incentive for certain
9 employees, not including the Weinstein Parties, to remain employed
10 with the debtors in the hope, ultimately successful, that he could
11 keep the debtors afloat while a buyer was sought. The trustee's
12 request included authority to pay substantial severance, plus a
13 bonus upon sale of the business, to such employees.³ The court
14 approved the request by order entered January 30, 2002.

15 By design, the trustee's request did not include any severance
16 or bonuses for the Weinstein Parties. However, the trustee did
17 agree to keep them on as salaried employees. The trustee employed
18 Marta Weinstein at the rate of \$25,000 per month (corresponding to
19 an annual salary of \$300,000) and employed Stephen Weinstein at the
20 rate of \$16,666 per month (corresponding to an annual salary of
21 \$200,000).

22
23 ³Under the plan, Mr. Westerbos was entitled to receive
24 severance pay in the sum of \$195,000 plus a bonus that turned out
25 to be \$200,000. Mr. Downey was entitled to receive severance pay
26 in the sum of \$50,000, plus a bonus that turned out to be
 \$200,000.

1 Apparently, the foregoing salaries were insufficient to assure
2 the cooperation of the Weinstein Parties in connection with a sale
3 of the debtors' assets. On December 31, 2001, while Marta Weinstein
4 was employed by the trustee at an annual salary of \$300,000, the
5 trustee entered into an agreement with the Weinstein Parties to
6 cancel certain non-recourse debt, secured by shares of the debtors'
7 stock, that the Weinstein Parties owed to the debtors. The
8 agreement recited the consideration as the Weinstein Parties'
9 "cooperation and assistance." Cf. Bankruptcy Code § 521(3).⁴

10 The trustee concedes that he had agreed with the Weinstein
11 Parties that he would defer any formal disclosure of the agreement
12 or request for court approval thereof until after a sale.

13 On July 11, 2002, the court approved a sale of the debtors'
14 assets. Approval came some four months after Marta Weinstein had
15 ended her employment with the trustee, and some nine months after
16 Stephen Weinstein had terminated his employment.⁵

17 /////

18
19 ⁴Bankruptcy Code § 521(3) provides: "The debtor shall -
20 (3) if a trustee is serving in the case, cooperate with the
21 trustee as necessary to enable the trustee to perform the
trustee's duties under this title."

22 ⁵According to both the trustee's motion (p. 5/lines 20-21)
23 and the Weinstein Parties' motion for reconsideration (p.
24 17/lines 17-18), Marta Weinstein's employment terminated March
25 15, 2002, through which date she was compensated. (At oral
26 argument, counsel for the Weinstein Parties represented, in
error, that Marta Weinstein left the trustee's employ in March
2001. March 6, 2003 hearing, R. at p. 12, line 9). Stephen
Weinstein's employment terminated October 26, 2001.

1 Thereafter, on February 21, 2003, some seven months after the
2 sale, the trustee entered into an agreement with the Weinstein
3 Parties to forgive certain recourse debt they owed to the estate,
4 and to convey to them certain software technology that belonged to
5 the estates. The agreement recited

6 After his appointment as chapter 11 trustee, the Trustee
7 requested and the Weinsteins agreed that the Weinsteins
8 would serve on a temporary employment basis, and
9 thereafter as consultants, to assist the Trustee as
10 requested in managing the sale of the Company and in
11 identifying potential claims against third parties. In
12 consideration for the Weinsteins' cooperation and
13 assistance, the satisfactory fulfillment of which the
14 Trustee hereby acknowledges, the Trustee has agreed
15 (subject to Bankruptcy Court approval as set forth below)
16 to release the liability of the Weinsteins on the Loan
17 Agreements and to transfer the AMS program to S. Weinstein
18 or his designee, all on the terms provided below.

13 Agreement for Cancellation of Indebtedness and Assignment of
14 Software Program, Para. R. Thus, according to this agreement, the
15 trustee was to forgive the recourse debt and convey the software
16 technology because of the Weinstein Parties' "cooperation and
17 assistance" during and after their tenure as employees. The
18 agreement was conditioned on court approval.⁶

19 /////

21 ⁶Even without the condition, the agreement would not have
22 been enforceable in the absence of court approval because of
23 Bankruptcy Code §§ 363(b)(1) (quoted at n. 1, supra) and 102(1)
24 (defining "notice and a hearing"), which prohibit a trustee from
25 using estate property out of the ordinary course of business,
26 over the objection of a party in interest, absent an authorizing
court order. See, e.g., In re Snyder, 74 B.R. 872, 874-75
(Bankr. E.D. Pa. 1987).

1 Under the aforementioned written agreements, the trustee agreed
2 to forgive non-recourse loans from the debtors that totaled
3 \$2,225,000, plus recourse loans that totaled \$480,000. Thus, when
4 immunity from any potential liability under Bankruptcy Code § 548(a)
5 (fraudulent conveyances) arising out of the non-recourse loans is
6 factored in, the total in debt forgiveness or immunity potentially
7 comes to \$2,705,000.⁷ The value of the software technology is
8 unknown to the court, but the Official Creditors' Committee (the
9 "Committee"), which opposed the original motion and opposes the
10 motion for reconsideration, believes that it might be valuable and
11 does not accept the trustee's stated view that the software
12 technology is worth no more than \$75,000.

13 On February 3, 2003, the trustee filed a motion seeking
14 approval of the debt forgiveness and transfers covered by the two
15 agreements. The motion recited the instances of the cooperation and
16 assistance that the Weinstein Parties provided to the trustee. The
17 motion did not mention the dates of such cooperation and assistance,
18 or whether and to what extent the trustee proposed to compensate the
19 Weinstein Parties for their cooperation and assistance while they

21 ⁷The motion for reconsideration states that the Weinstein
22 Parties are seeking only the software technology and forgiveness
23 of the loans, and that the motion does not affect "other claims"
24 that the creditors' committee may have against the Weinstein
25 Parties. It is unclear to the court, however, whether a release
26 of the Weinstein Parties for any liability under the nonrecourse
notes would carry with it a release of any liability for having
received corporate assets in exchange for such nonrecourse notes.
Given the court's rulings, this potential issue is now moot.

1 were employed by the trustee. The Committee opposed the motion.

2 On March 13, 2003, this court entered its order denying the
3 motion. Referencing the Committee's opposition, the court held that
4 any agreement by the trustee to enhance the Weinstein Parties'
5 aggregate \$500,000 per year salaries for serving as employees, or to
6 hire them thereafter as compensated "consultants," had not been
7 disclosed to the creditors or court before the Weinstein Parties
8 provided the services. The court also held that the estate was not
9 under any contractual obligation to forgive any debt owing by the
10 Weinstein Parties or to transfer any assets to them, that no valid
11 justification for approval of the arrangements had been presented,
12 and that the trustee's proposal was essentially one to make a gift
13 to the Weinstein Parties of potentially valuable estate assets.

14 The present motion for reconsideration by the Weinstein Parties
15 followed.

16 B. Nunc Pro Tunc Employment Authority

17 Pursuant to Bankruptcy Code § 327(a), the trustee may employ
18 professional persons only "with court approval." Pursuant to Fed.
19 R. Bankr. P. 2014, a trustee's application to employ a professional
20 person must include, among other things, "the specific facts showing
21 the necessity for employment," the "professional services to be
22 rendered," and the "proposed arrangement for compensation." Here,
23 the trustee did not comply. Absent compliance, compensation is not
24 allowable. Bankruptcy Code § 330(a)(1) (compensation out of the
25 estate may be allowed only to "persons employed under section 327");
26 In re Haley, 950 F.2d 588, 590 (9th Cir. 1991) (holding that real

1 estate broker who procured buyers of estate property was not
2 entitled to be compensated out of the estate because the broker's
3 employment had not been authorized prior to the broker's rendering
4 of services).

5 Acknowledging that prior court approval pursuant to Bankruptcy
6 Code § 327(a) and Fed. R. Bankr. 2014 was neither sought nor
7 obtained before the Weinstein Parties provided the services at
8 issue, the Weinstein Parties now ask the court to ratify the secret
9 arrangement, nunc pro tunc.

10 Nunc pro tunc approval is not warranted (even putting aside the
11 fact that the trustee has not filed an application to employ the
12 Weinstein Parties on a nunc pro tunc basis, or as of this date
13 otherwise fully complied with the requirements for employment of a
14 professional person as provided by Bankruptcy Code § 327(a) and Fed.
15 R. Bankr. P. 2014).

16 In In re THC Financial Corp., 837 F.2d 389, 392 (9th Cir.
17 1988), the Ninth Circuit held that a court may approve a trustee's
18 employment arrangement with a professional person, nunc pro tunc,
19 but only under "exceptional circumstances" and only when the trustee
20 has given a "satisfactory explanation for the failure to receive
21 prior judicial approval" and if the professional person has
22 conferred a substantial benefit to the estate. See also In re
23 Atkins, 69 F.3d 970, 974 (9th Cir. 1995).

24 Here, the trustee and the Weinstein Parties have not given a
25 satisfactory explanation for the delay. Indeed, they have given no
26 explanation. Nor do any other equitable factors justify the award,

1 e.g., the need to provide services immediately because of a time
2 emergency, or because an innocent professional person was mislead
3 into believing that the trustee would seek immediate court approval
4 of the professional's employment. See Atkins, 69 F.3d at 976-78.
5 Moreover, although not determinative, the consent of the creditors,
6 missing here, has generally been an important factor in courts'
7 decisions to grant a request for a nunc pro tunc employment order.
8 Id.

9 In addition, even if the trustee had timely applied for
10 authority to employ the Weinstein Parties on the terms provided by
11 the two agreements, it is quite doubtful that the court would have
12 approved same over the objection of the Committee. See Atkins, 69
13 F.3d at 974 (mentioning the factors relevant to an application for
14 nunc pro tunc employment set forth in In re Twinton Properties
15 Partnership, 27 B.R. 817, 819-20 (Bankr. M.D. Tenn. 1983)).

16 Thus, even if the Weinstein Parties conferred a substantial
17 benefit on the estate for which they were not otherwise compensated,
18 a contention by the Weinstein Parties that the Committee vigorously
19 disputes, the Weinstein Parties would not be entitled to a nunc pro
20 tunc order of employment. Atkins, 69 F.3d at 974.

21 This conclusion is not only mandated by the Bankruptcy Code and
22 all of the applicable Ninth Circuit case law thereunder,⁸ but by

23 ⁸In fact, the court's attention has not been directed to
24 even one reported Ninth Circuit decision wherein the court
25 approved nunc pro tunc employment under circumstances where the
26 trustee and professional were aware of the requirement of court
(continued...)

1 sound policy. Secret compensation deals between fiduciaries of
2 bankruptcy estates and those that they employ are not to be
3 condoned. They seriously sabotage the integrity of the bankruptcy
4 process, undermine creditor confidence in that process and in the
5 professionals entrusted with the management of the valuable assets
6 of the estate, and sometimes victimize both creditors and innocent
7 professionals (not the case here) who have provided services to the
8 estate in good faith in the expectation of being fairly compensated.
9 If courts were to condone such deals by granting nunc pro tunc
10 applications that do not meet the established criteria,
11 transgressions would only become more frequent. See In re Kroeger
12 Properties and Development, Inc., 57 B.R. 821, 822-23 (9th Cir. BAP
13 1986); In re Downtown Investment Club III, 89 B.R. 59, 63 (9th Cir.
14 BAP 1988).

15 C. Quantum Meruit

16 The Weinstein Parties contend that the court should approve the
17 debt forgiveness and asset transfer based on the equitable doctrine
18 of quantum meruit. The court disagrees. Even putting aside the
19 disputed factual issues as to what the Weinstein Parties did, when,
20 why, and the value thereof, or any issues as to the malfeasance
21 alleged by the Committee, the simple fact is that the Bankruptcy
22

23 ⁸(...continued)
24 approval before the services were rendered, had time available to
25 seek a court order without any risk of damage to the estate, and
26 nevertheless elected to disregard the employment requirements of
the Bankruptcy Code and rules.

1 Code does not permit professionals to be compensated "for services
2 performed on behalf of a bankruptcy estate based on state law
3 theories not provided for by the Code, such as quantum meruit." In
4 re Weibel, Inc., 176 B.R. 209, 212 (9th Cir. BAP 1994). See also In
5 re Monument Auto Detail, Inc., 226 B.R. 219, 224-25 (9th Cir. BAP
6 1998).

7 In re De Laurentiis Entertainment Group, Inc., 963 F.2d 1269
8 (9th Cir. 1992), cited by the Weinstein Parties, is not to the
9 contrary. In De Laurentiis, the issue was the allowability of a
10 prepetition creditor claim under California law. The case had
11 nothing to do with compensation of professionals employed by a
12 trustee, postpetition, under the Bankruptcy Code. Id. at 1271-73.

13 D. Other Arguments

14 The Weinstein Parties have raised several other arguments in
15 connection with the original motion or motion for reconsideration,
16 none of which have any merit. They argue that certain allegations
17 of malfeasance that the Committee has raised are not well grounded.
18 The court, however, did not and does not base its ruling on the
19 validity of such allegations, which remain in dispute.

20 The Weinstein Parties argue that some employees received
21 severance pay and bonuses from the estate in addition to their
22 salaries, which they (the Weinstein Parties) did not, and that they,
23 too, deserve a compensation package funded by the estate in addition
24 to the salaries that the trustee contracted to pay them. The
25 difference is that, unlike the trustee's arrangement with the
26 Weinstein Parties, the trustee's retention plan as to the other

1 employees was disclosed to all parties in interest, found by the
2 court to have been reasonable, and was approved by the court, in
3 open court, pursuant to an application on file with the court,
4 before the affected employees continued their employment with the
5 debtors in reliance on the retention plan.⁹

6 The Weinstein parties argue that the court denied the original
7 motion without prejudice and that they have now justified the motion
8 for reconsideration with additional evidence. It is true that the
9 court denied the trustee's motion without prejudice, but only to
10 allow reconsideration if the assets at issue proved to be without
11 value such that an abandonment under Bankruptcy Code § 554(a) might
12 be warranted (in which case a conveyance to the Weinstein Parties
13 might be of no cost to the estate). March 6, 2003 hearing, R.
14 p. 21/line 23 - p. 22/line 9. There is no evidence before the court
15 that the assets in question are valueless, and the Committee
16 continues to believe that they have substantial value. Thus,
17 nothing new has been presented that would justify a change in the
18 original ruling.

19 E. Conclusion

20 The motion for reconsideration is without merit, and has thus
21 been denied.

22 _____
23 ⁹The Weinstein Parties' moving papers suggest that the
24 Committee was aware of and agreed to the payment of additional
25 compensation to the Weinstein Parties for their cooperation and
26 assistance. There is no supporting evidence before the court
that such suggestion is true, and any such evidence would not
justify a change in the result.

Dated: June 11, 2003

Edward D. Jellen
United States Bankruptcy Judge

